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NO. 87-6700

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1987

JOHN HENRY SELVAGE,

Petitioner,

v.

JAMES A. LYNAUGH, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether procedural default on a Franklin v. Lynaugh claim can be found without first examining the complete record of judicial responses to such a claim at the time it could have been timely raised, and without examining whether the need to avoid a "fundamental miscarriage of justice" calls for avoidance of the procedural default rule?

II. Whether a condemned Texas prisoner who presents the same issue that is before the Court in Franklin v. Lynaugh must have his execution stayed pending the decision in Franklin.

III. Even if the Court decides in Franklin v. Lynaugh that the Texas death penalty statute does not preclude the jury's consideration of mitigating circumstances in violation of the Eighth Amendment, whether a condemned Texas prisoner must be given the opportunity to show that reasonably effective counsel could nevertheless have construed the statute as precluding the consideration of some mitigating circumstances, and that, because his lawyer held this view, relevant mitigating evidence was not investigated or presented on his behalf, thereby depriving him of the assistance of counsel and of an individualized sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments?

IV. Whether the pendency before the en banc Fifth Circuit in another case of the very same issue raised by petitioner requires that petitioner's case be held for the en banc decision and precludes the panel before whom petitioner's case is heard from deciding the merits of that issue itself?

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RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES James A. Lynaugh, Director, Texas Department of Corrections, Respondent herein,[1] by and through his attorney, the Attorney General of Texas, and files this Brief in Opposition.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit denying Selvage relief and vacating a stay of execution is not yet published, Selvage v. Lynaugh, ___ F.2d ___, No.87-2285, slip op. 2790 (5th Cir. March 28, 1988), is attached as Appendix A to the petition for writ of certiorari. The opinion of the United States District Court for the Southern District of Texas denying Selvage habeas relief but granting a stay of execution is not published and is attached as Appendix B to the petition for writ of certiorari.

[1] For clarity, Petitioner is herein referred to as "Selvage" and Respondent as "the state."

JURISDICTION

Selvage seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Selvage bases his claims upon the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

The state has lawful custody of Selvage pursuant to a judgment and sentence of the 230th Judicial District Court of Harris County, Texas, in Cause No. 305495, styled The State of Texas v. John Henry Selvage. On December 4, 1979, Selvage was indicted in a two-paragraph indictment for the offense of capital murder of Albert Garza, while in the course of committing and attempting to commit the offense of robbery of Stephen Ventura, and for the offense of capital murder of Albert Garza, a peace officer known by Selvage to be acting in the lawful discharge of an official duty, to which Selvage entered a plea of not guilty.

Trial began on February 4, 1980, and on February 8, 1980, the jury found Selvage guilty of the capital offense. On February 11, 1980, after a punishment hearing, the jury answered affirmatively the two special issues submitted pursuant to Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon Supp. 1988). Accordingly, punishment was assessed at death. Selvage appealed to the Texas Court of Criminal Appeals, which affirmed on July 11, 1984, Selvage v. State, 680 S.W.2d 17 (Tex. Crim. App. 1984), and denied rehearing on October 10, 1984. Selvage did not seek certiorari review.

The trial court subsequently scheduled Selvage's execution for November 14, 1985. Without seeking state habeas corpus relief, Selvage filed an application for writ of habeas corpus

and an application for stay of execution in the United States District Court for the Southern District of Texas, Houston Division, which granted the requested stay on November 8, 1985. On January 26, 1986, Selvage filed his amended petition for writ of habeas corpus, which was denied by the court on October 6, 1986. Notice of appeal was not timely filed. However, on March 4, 1986, the district court vacated its earlier judgment pursuant to Fed.R.Civ.P. 60(b), but readopted its previous memorandum and order denying habeas corpus relief. Selvage v. Lynaugh, No. H-85-6253 (S.D. Tex. March 4, 1986). Selvage appealed the district court's judgment, and the United States Court of Appeals for the Fifth Circuit affirmed on July 23, 1987. Selvage v. Lynaugh, 823 F.2d 845 (5th Cir. 1987). A petition for writ of certiorari was subsequently denied by this Court on November 2, 1987. Selvage v. Lynaugh, ___ U.S. ___, 108 S.Ct. 309 (1987).

While his Rule 60(b) motion was pending in the district court, Selvage filed his first state habeas corpus application in the state convicting court on March 3, 1987. The application was subsequently denied by the Texas Court of Criminal Appeals. Ex parte Selvage, No 16,884-01 (Tex. Crim. App. March 6, 1987).

On December 10, 1987, the trial court rescheduled Selvage's execution for January 27, 1988. On January 21, 1988, Selvage filed his second state habeas corpus application in the trial court. On January 25, 1988, the trial court modified Selvage's death warrant and rescheduled his execution for March 30, 1988. On March 14, 1988, the trial court entered findings of fact and conclusions of law, recommended denial of the writ and forwarded the application to the Court of Criminal Appeals, which adopted the trial court's findings in denying the writ. Ex parte Selvage, No. 16,884-02 (Tex. Crim. App. Mar. 21, 1988).

On January 22, 1988, while his state habeas application was pending, Selvage filed his second application for federal writ of habeas corpus and an application for stay of execution in the district court below. After Selvage had exhausted his state remedies, the district court denied habeas relief on all of

Selvage's claims except his claim relating to the trial court's refusal to allow voir dire examination of prospective jurors on parole considerations. The district court granted a stay of execution based upon this latter issue and held judgment on that issue in abeyance pending the Fifth Circuit's en banc reconsideration of King v. Lynaugh, 828 F.2d 257 (5th Cir.), reh. en banc granted, 828 F.2d 269 (5th Cir. 1987). Selvage v. Lynaugh, No. H-88-0166 (S.D. Tex. March 25, 1988).

The state immediately appealed the district court's granting of a stay of execution and Selvage appealed the district court's denial of habeas relief on the remaining issues. The court of appeals subsequently vacated the stay of execution, denied Selvage a certificate of probable cause to appeal and denied a stay of execution on the remaining issues. Selvage v. Lynaugh, ___ F.2d ___, slip op. 2790 (5th Cir. March 28, 1988). However, on March 29, 1988, this Court ordered Selvage's execution stayed pending resolution of the instant petition. Selvage v. Lynaugh, ___ U.S. ___, 108 S.Ct. 1283 (1988).

B. Statement of Facts

The facts surrounding Selvage's commission of capital murder are accurately set forth in the opinion of the Court of Criminal Appeals, Selvage v. State, 680 S.W.2d at 18-19, and the opinion of the United States Court of Appeals for the Fifth Circuit affirming the denial of Selvage's first federal habeas corpus application. Selvage v. Lynaugh, 823 F.2d at 846-47.

SUMMARY OF THE ARGUMENT

There is no special or important reason for this Court to exercise its certiorari jurisdiction. The court below applied correct principles of constitutional and procedural law in rejecting Selvage's claims.

The court of appeals below correctly held review of Selvage's Franklin claims to be barred under the procedural default doctrine. Trial counsel had actual knowledge of the existence of the claim at the time of trial, yet failed to object on that basis. Because the Franklin claim was available at the

time of trial, and there is no manifest injustice in applying a procedural bar, the refusal to review the merits of the claims was proper.

Even were review of the merits of Selvage's Franklin claims proper, he is not entitled to relief. The Texas capital sentencing procedures allow for the presentation and consideration of all relevant mitigating evidence regarding a defendant's crime and character. Selvage points to no evidence that is precluded from consideration by a Texas jury, and his complaint that the jury cannot give effective consideration to the mitigating evidence amounts to nothing more than Selvage's disagreement with his jury's verdict. To adopt Selvage's argument would constitutionally mandate that a jury be merciful, and such an action would constitute a return to unguided, unreviewable sentencing decisions, and thus the arbitrary and capricious imposition of death sentences condemned in Furman v. Georgia.

The court of appeals below, applying established constitutional precedent of this Court, properly concluded that voir dire examination of prospective jurors on parole considerations is not constitutionally mandated. Selvage fails to demonstrate a constitutionally unjustifiable risk of bias that would give rise to such a right. Moreover, the decision by the court of appeals below to deny a certificate of probable cause and a stay of execution on this issue represents a proper application of this Court's holding in Barefoot v. Estelle.

REASONS FOR DENYING THE WRIT

I.

THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.

Rule 17 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. Selvage has advanced no special or important reason in this case, and none exists. This case involves the proper application of settled principles of

constitutional and procedural law to Selvage's particular factual circumstances. The court below properly applied the procedural default doctrine, see Engle v. Isaac, 456 U.S. 107 (1982), in rejecting Selvage's Franklin claims. See Franklin v. Lynaugh, 823 F.2d 98 (5th Cir.), cert. granted, ___ U.S. ___, 108 S.Ct. 221 (1987). Moreover, the court below properly applied established precedent of this Court in rejecting Selvage's claim relating to voir dire examination of jurors on parole considerations, and his claim that a prior panel decision of the Fifth Circuit, which had been vacated by that court, mandated a stay of execution finds no support in Barefoot v. Estelle, 463 U.S. 880 (1983).

II.

THE TEXAS CAPITAL SENTENCING STATUTE AS APPLIED MEETS THE CONSTITUTIONAL REQUIREMENT OF INDIVIDUALIZED SENTENCING WITHOUT THE NECESSITY OF A SPECIAL INSTRUCTION ON MITIGATING EVIDENCE.

In his first three interrelated claims, Selvage argues that the Texas capital sentencing statute precludes jury consideration of relevant mitigating evidence that might serve as a basis for a sentence less than death. He contends that because the jury is limited to answering the special issues submitted pursuant to Tex. Code Crim. Proc. Ann. art. 37.071(b) (Vernon Supp. 1988), and because the state does not require an instruction on how to consider mitigating evidence, the jury could fail to see the relevance of some evidence that might persuade it to not impose the death penalty. Thus, the evidence would not be taken into consideration during punishment deliberations, in violation of the holdings of Lockett v. Ohio, 438 U.S. 536 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982), and their progeny. Selvage further contends that trial counsel, perceiving the flaw in the Texas statute, reasonably forewent investigation and, thus, did not present evidence of Selvage's mental condition in mitigation of punishment. He relies on the granting of the petition for writ of certiorari in Franklin v. Lynaugh, ___ U.S. ___, 108 S.Ct. 221 (1987), to support his contentions.

A. Consideration of Selvage's claim is barred by his failure to object on this basis at the time of trial.

Prior to trial, Selvage filed a motion to have the Texas capital sentencing statute declared unconstitutional on the basis that it violated his right to be free from cruel and unusual punishment, and was vague and indefinite so as to violate his rights to due process. Selvage did not object to the court's charge at the punishment phase of trial and did not submit a proposed instruction on mitigating evidence or otherwise object to the capital sentencing statute on the grounds now urged. When he presented these claims in his application for state writ of habeas corpus, the state courts noted that his current claims did not comport to his objection to the validity of the statute voiced at trial and, consequently, the courts imposed their contemporaneous objection rule and held that review of the merits of the claims were barred. Ex parte Selvage, No. 16,884-02 (March 21, 1988).

When a defendant fails to follow a state procedural rule and review of a claim of error is refused by state courts, federal habeas review of the claim is barred, unless he can demonstrate cause for his failure and resulting prejudice. Murray v. Carrier, 477 U.S. ___, ___, 106 S.Ct. 2639, 2648 (1986); Engle v. Isaac, 456 U.S. 107, 129 (1982); Wainwright v. Sykes, 433 U.S. 72, 87 (1977). Selvage has demonstrated no cause for his failure to timely object on the grounds now raised, nor has he alleged any prejudice. Accordingly, the Fifth Circuit held review of his Franklin claims to be procedurally barred.

Selvage faults the Fifth Circuit's respect of the state procedural bar for two reasons. First, he contends that the Franklin issue was not reasonably available to counsel at the time of trial, and therefore its "novelty" excuses Selvage's procedural default. This argument ignores both the facts of Selvage's case and the state of the law, both federal and state, at the time of trial. In support of his Franklin claims, Selvage submitted an affidavit of his trial counsel, wherein counsel

stated that he was aware before Selvage's trial of a flaw in the Texas scheme that supposedly prevented a jury from properly considering mitigating evidence. Selvage must be held to vouch for the veracity of his proffered evidence, and, therefore, cannot claim that counsel was unaware of either the factual or legal bases for an objection.

Moreover, as pointed out by the Fifth Circuit, the law at the time of trial was far from certain. While this Court had, in light of the Court of Criminal Appeals' interpretation of the second special punishment issue, affirmed the facial validity of the Texas capital sentencing scheme in Jurek v. Texas, 428 U.S. 262 (1976), it left open the question of the constitutional validity of its application, leaving the interpretation of the statute to the state courts. This view of the Texas statute was again noted in Lockett v. Ohio, 438 U.S. 586 (1978). In Lockett, however, the Court did not address the constitutional effect of subsequent interpretation of the Texas statute by Texas courts regarding the procedures for jury consideration of mitigating evidence. As correctly noted by the Fifth Circuit, the first time the Franklin claim was before this Court, and indeed the first time it was squarely presented to the Court of Criminal Appeals, was in Quinones v. State, 592 S.W.2d 933 (Tex. Crim. App.), cert. denied, 449 U.S. 893 (1980). Quinones was decided approximately one month before Selvage's trial, and trial counsel is chargeable with knowledge of that fact and, consequently, the existence of a ground for objection at the time of trial. Moreover, the constitutional validity of the Texas procedure challenged by Selvage and Franklin was far from settled at the time of Selvage's trial, given the fact that the question had never been presented to this Court. Hence, the Franklin claim was clearly "available" at the time of trial, and thus a failure to object cannot be excused on novelty grounds. Smith v. Murray, ___ U.S. ___, ___, 106 S.Ct.2661, 2667-68 (1986).

Selvage next urges that his procedural default should be excused because it would result in a fundamental miscarriage of

justice. However, Selvage does not point to any false or misleading testimony which resulted in either his conviction or death sentence. Selvage's counsel's decision to not present psychiatric testimony was a sound tactical decision to avoid state psychiatric testimony in rebuttal. Moreover, counsel presented evidence of Selvage's personality change, drug addiction and availability of treatment without risking rebuttal by the state. See footnote 6, infra. Hence, the sentencing decision in Selvage's case was not perverted such that a fundamental miscarriage of justice occurred. Smith v. Murray, ___ U.S. at ___, 106 S.Ct. at 2668-69. Thus, because Selvage cannot demonstrate adequate cause for his procedural default, his Franklin claims were properly rejected by the court below without addressing their merits.

B. Selvage is not entitled to relief on the ground that the Texas capital sentencing statute is unconstitutional.

Even if the Court were to address the merits of Selvage's claim, he is not entitled to relief. The determination of what factors are relevant to a sentencing decision is a legislative matter, to which the courts normally will defer. Booth v. Maryland, ___ U.S. ___, ___, 107 S.Ct. 2529, 2532 (1987); Lockett v. Ohio, 438 U.S. 586, 604 (1978). Nevertheless, the Constitution does impose certain requirements on the factors a capital-murder jury may consider in making its punishment decision. To pass constitutional scrutiny, a state's capital sentencing procedure must allow for individualized sentencing. California v. Brown, ___ U.S. ___, ___, 107 S.Ct. 837, 839 (1987). This is accomplished by permitting the defendant to introduce and the sentencing authority to consider, as a mitigating factor, any evidence relevant to "any aspect of the defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Id.; Lockett v. Ohio, 438 U.S. at 604.

In those instances where the Court has identified specific kinds of evidence as being relevant to the sentencing

considerations, the evidence has had some bearing on the defendant's personal responsibility and moral guilt for his crime, or on those aspects of his character indicative of whether he will constitute a future threat. For example, in Lockett, the Court referred to evidence of the defendant's character, prior record, age, lack of specific intent to cause death, and the relatively minor part the defendant played in the crime as evidence that was relevant to the sentencer's decision but that was excluded from its consideration. 438 U.S. at 597.

In Eddings v. Oklahoma, 455 U.S. 104 (1982), the Court held that the trial and appellate courts' refusal to consider evidence of the defendant's age, difficult family history, and emotional disturbance in deciding whether the death penalty was appropriate was error because that evidence was relevant to the sentencing decision. Id. at 115; see also Hitchcock v. Dugger, ___ U.S. ___, 107 S.Ct. 1821 (1987). The Eddings Court emphasized that the relevance of such evidence lay in the fact that it indicated a lack of maturity and diminished the defendant's responsibility for his actions. Eddings, 455 U.S. at 116.

In another case decided the same term, the Court held that the death penalty could not constitutionally be imposed on one who did not himself kill, attempt to kill, or intend that lethal force be used. Enmund v. Florida, 458 U.S. 782 (1982). The Court did not expressly refer to the defendant's degree of personal participation in the crime as mitigating evidence. It did note, however, that the defendant's intent--and therefore his moral guilt--is critical to the degree of his criminal culpability, and reiterated that his personal culpability is a component of the individualized consideration mandated by the Eighth Amendment. Id. at 800; see also Tison v. Arizona, ___ U.S. ___, 107 S.Ct. 1676 (1987).

More recently, in Skipper v. South Carolina, ___ U.S. ___, 106 S.Ct. 1669 (1986), the Court recognized that a capital-murder defendant's adjustment to prison life was relevant mitigating evidence that the sentencer could not be precluded from

considering. The inferences that could be drawn from such evidence "would not relate specifically to [the defendant's] culpability for the crime he committed, . . . [but] there is no question that such inferences would be 'mitigating' in the sense that they might serve 'as a basis for a sentence less than death.'" Id. at ___, 106 S.Ct. at 1671. The opinion went on to stress that the evidence was relevant to whether the defendant would pose a future threat if he were not executed. Id. at ___, 106 S.Ct. at 1671-73.

In Sumner v. Shuman, ___ U.S. ___, 107 S.Ct. 2716 (1987), the Court invalidated a statute that provided for a mandatory death sentence for a prison inmate who committed murder while serving a life sentence without possibility of parole. The constitutional defect in the statute was its failure to allow the sentencer to consider such factors as the defendant's degree of participation in the crime, his prior record, youth, the influence of alcohol, drugs, and extreme emotional disturbance, circumstances that the defendant reasonably believed provided a moral justification for his conduct, and his behavior while in prison. Id. at ___, 107 S.Ct. at 2725-26.

The Texas statute clearly permits a defendant to introduce any relevant mitigating evidence that he wants the jury to consider in making its punishment decision. The statute does not contain a list of defined mitigating factors, as did the Ohio statute in Lockett and the Florida statute in Hitchcock, both of which were held to preclude introduction and consideration of certain mitigating evidence. Instead, under the Texas scheme, any evidence relating to the defendant's character or to any of the circumstances of the offense can be put before the jury.[2]

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[2]In briefing and argument before the Court in Franklin, it was claimed that the Court's holding in Jurek was premised on a promise by the Texas Court of Criminal Appeals to interpret its statute liberally to allow the introduction of all relevant mitigating evidence, and that the Texas court had failed to fulfill its promise. Neither Selvage nor Franklin points to any
(Footnote Continued)

Furthermore, the special issues allow for jury consideration of the proffered evidence. The first special issue asks the jury to determine whether the defendant acted deliberately and with the reasonable expectation that the death of the victim or another would result. This question asks the jury to determine more than whether the defendant acted with the requisite criminal intent, Heckert v. State, 612 S.W.2d 549 (Tex. Crim. App. 1981), and focuses attention on his personal responsibility and moral guilt. See Green v. State, 682 S.W.2d 271 (Tex. Crim. App. 1984), cert. denied, 470 U.S. 1034 (1985); Meanes v. State, 668 S.W.2d 366 (Tex. Crim. App. 1983), cert. denied, 466 U.S. 945 (1984). Evidence about the circumstances surrounding the murder is relevant to determining the answer to this issue, as are the defendant's degree of involvement in the crime, his age, emotional and mental development, and any history of substance abuse. For example, Selvage introduced evidence of his drug addiction as mitigating evidence. In addition, the jury can readily grasp the significance of such evidence to the first special issue, and the defendant can enhance the jury's perception of the evidence by introducing expert testimony and by jury argument.

Likewise, the second special issue concerns whether there is a probability that the defendant will commit future acts of violence that would constitute a continuing threat to society.[3]

(Footnote Continued)
case where the exclusion of relevant mitigating evidence was upheld by the Court of Criminal Appeals. To the contrary, that court consistently reverses cases where such evidence is excluded. Cass v. State, 676 S.W.2d 589 (Tex. Crim. App. 1984); Robinson v. State, 548 S.W.2d 63 (Tex. Crim. App. 1977).

[3]In Barefoot v. Estelle, 463 U.S. 880 (1983), the Court expressly held that the future dangerousness of a convicted capital murderer was a constitutionally valid sentencing consideration. Without restricting the evidence to be admitted on the second special issue, the Court of Criminal Appeals listed evidence which a jury typically could consider in answering the special issue: whether the defendant had a significant criminal record; the range and severity of his prior criminal conduct; the age of the defendant; whether or not at the time of the offense he was acting under duress or under the domination of another; and whether the defendant was under an extreme form of mental or emotional pressure, "something less, perhaps, than insanity, but
(Footnote Continued)

Evidence of the defendant's age, past behavior, upbringing, mental and emotional development, and prospects for rehabilitation is relevant to the jury's consideration of this issue. Again, Selvage offered much of this kind of evidence in mitigation at his trial. Selvage again points to no evidence he was precluded from offering, nor does he demonstrate that state case law since Jurek has restricted a defendant's ability to present or a jury's ability to consider mitigating evidence on this special issue The fact that the jury was not persuaded by Selvage's evidence indicates only that it ascribed less weight to the evidence than he does, not that the evidence was excluded from consideration.[4]

This, in fact, is the basis of Selvage's argument. He is simply dissatisfied because, although he was able to present all of the relevant mitigating evidence he had available and the jury was able to consider it, the jury did not find the evidence sufficient to justify answering either of the special issues negatively. Because the evidence did not have the decisive effect on the jury that it has on himself, Selvage contends that the evidence could not have been fully considered because of the structure of the statute.[5] However, the Court has recognized

(Footnote Continued)
more than the emotions of the average man, however inflamed, could withstand." Jurek v. State, 522 S.W.2d 934, 939-40 (Tex. Crim. App. 1975).

[4]Selvage, like Franklin, does not appear to quarrel with Texas' third special issue on punishment, whether, if raised by the evidence, the defendant's conduct in killing the deceased was unreasonable in response to the provocation, if any, by the deceased. Tex.Code Crim.Proc.Ann. art. 37.071(b)(3) (Vernon Supp. 1988). This issue clearly allows a defendant, at the very least, to present mitigating evidence that he "reasonably believed provided a moral justification for his conduct." Sumner v. Shuman, ___ U.S. at ___, 107 S.Ct. at 2725.

[5]Selvage's conclusion does not follow from the premise, and fully demonstrates the illogical nature of his, and Franklin's, argument. The argument -- "my mitigating evidence is sufficient in my mind to warrant a sentence less than death; I presented my evidence to the jury, but it returned a death sentence; therefore, the Texas statute does not allow for full consideration of mitigating evidence by the jury" -- would make even the most dedicated sophist blush.

that it is the sentencer's function to determine the weight that should be given to the evidence before it. Eddings, 455 U.S. at 114-15 ("The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence."); Barclay v. Florida, 463 U.S. 939, 961 n.2 (1983) (Stevens, J., concurring) (neither Lockett nor Eddings held that any particular weight must be given by the sentencer to mitigating evidence). The fact that a capital murder defendant disagrees with the conclusion reached by the jury does not mean that the jury was precluded from considering, or failed to consider, all of the evidence he introduced.

Further, Selvage's claim that potentially mitigating evidence of his alleged psychosis was withheld because it could have been used as, or rebutted by, evidence to support imposing a death sentence is unavailing. The Constitution does not require that evidence introduced in a capital-sentencing hearing be exclusively mitigating or aggravating. That both the state and the defendant might be able to use the same evidence to support opposing contentions does not offend the Constitution, as long as the jury is not precluded from considering the mitigating aspects of the evidence. Evidence relating to punishment is circumstantial, and, like any circumstantial evidence, it is susceptible of more than one interpretation. It is for the sentencer to determine what weight each aspect of the evidence receives. Selvage has failed to identify any relevant mitigating evidence that the jury is precluded from considering under the Texas statute.

Selvage's argument appears to be that the defendant must be given the exclusive right to determine what evidence is mitigating and what is aggravating; once he designates certain evidence as mitigating, the state would be precluded from rebutting it. This Court has never devised a rule that removes the adversary process from any aspect of a capital murder trial, nor should it. Factors such as cross-examination, the state's bearing the burden of proof beyond a reasonable doubt, and the weighing of evidence by a jury drawn from a fair cross-section of the community are

fundamental components of the system that has been shown to be the greatest truth-finding process known to man. Removing adversarial testing of evidence from the penalty phase of a capital murder trial can hardly promote the rational and even-handed imposition of the death penalty, nor would it insure the enhanced reliability of such sentencing determinations.[6]

Selvage's claim ultimately appears to be that a capital sentencing statute, as a constitutional matter, must allow the jury to dispense mercy, even though it finds that the evidence warrants the death penalty. The Court has recognized that the occasional granting of mercy to a defendant does not violate the Constitution. Gregg v. Georgia, 428 U.S. 153, 199 (1976). The Court has also approved the Texas statute while noting that the death penalty is mandatory if the jury answers all of the special issues affirmatively. Jurek v. Texas, 428 U.S. at 278 (White, J., concurring); see also Lowenfield v. Phelps, ___ U.S. ___, ___, 108 S.Ct. 546, 554 (1988). Further, in California v. Brown, ___ U.S. at ___, 107 S.Ct. at 840, the Court expressly held that there is no constitutional violation in giving an instruction that tells the jury it is not to be swayed by mere sentiment or

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[6]From the above, it is clear that Selvage's claim that the operation of the Texas capital sentencing procedures rendered trial counsel ineffective must fail. In two affidavits, counsel stated that, in his opinion, had the defense presented psychiatric testimony in mitigation of punishment, the state would have rebutted such evidence with its own psychiatric evidence, which would have effectively converted the defense's "mitigating" evidence into "aggravating" evidence. Because counsel, through his observations and his conversations with Selvage and his family did not perceive the existence of any mental problems, counsel forewent further investigation into this area. Counsel elected, however, to present evidence of Selvage's drug addiction and changed personality through the testimony of his sister and to present testimony of the availability of drug rehabilitation in prison through the testimony of a prison doctor, all without risking rebuttal by the state. That the state was free to rebut any psychiatric evidence offered during punishment is apparent. Buchanan v. Kentucky, ___ U.S. ___, 107 S.Ct. 2906 (1987). Ultimately, therefore, the only question to be resolved is whether counsel's decision was reasonable, and Selvage does not fault counsel for declining to further investigate, nor can he. Counsel's decision was reasonable under the circumstances of this case. Burger v. Kemp, ___ U.S. ___, 107 S.Ct. 3110 (1987).

sympathy in making its capital-sentencing decision. Such factors should not "play any role in the jury's sentencing determination, even if such factors might weigh in the defendant's favor."[7]

To adopt Selvage's argument would remove all rationality from the Texas capital-sentencing procedure and would allow juries to base their verdicts on emotion rather than evidence. Such a result would effectively constitute a return to the arbitrary and capricious imposition of the death penalty. In Furman v. Georgia, 408 U.S. 238 (1972), the Court held that, as then applied, capital punishment was unconstitutional. Because juries were being given no guidance in making their sentencing decisions, the death penalty was being imposed in a wanton and freakish manner. Id., at 310 (Stewart, J., concurring). Responding to Furman, Texas crafted a statute that channels the jury's discretion by requiring it to answer questions about the defendant's personal responsibility and moral guilt for his crime, and about the likelihood that he will be a threat to society in the future. The trial court instructs the jury to consider all of the evidence presented at trial in making its decision and reminds it that the state bears the burden of proof beyond a reasonable doubt. Selvage would undermine all of these safeguards that insure that death sentences in Texas represent a reasoned response to the evidence by requiring the jury to consider whether the defendant should be spared as an act of mercy. Were the Court to adopt Selvage's argument, the state's

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[7]In an anologous situation, the Court invalidated the state's exclusion for cause of prospective jurors whose verdicts would be "affected" by the possibility of a death sentence because the jurors' responses were likely to be expressions of the seriousness or gravity with which they invest their deliberations, their emotional involvement or that the prospects of the death penalty "may affect what their honest judgment of the facts will be or what they may deem to be a reasonable doubt." Adams v. Texas, 448 U.S. 38, 49-50 (1980). Similarly, feelings of mercy or sympathy related to an aspect of a defendant's crime or character may be expressed by the manner whereby a juror ascribes weight to a defendant's mitigating evidence or whereby he determines what constitutes a reasonable doubt. Texas jurors can thus effectively consider any mitigating evidence a defendant chooses to present.

efforts to guide the jury's discretion will be rendered a nullity, and the jury's answers to the special issues would be meaningless. After focusing on the defendant before it and on the factors relevant to the sentencing determination, the jury would have to be asked to ignore the evidence and to abandon rationality and simply decide, on the basis of emotion and whim, whether the defendant should be sentenced to death or to life imprisonment. As Justice White recognized in his concurrence in Lockett, "[b]y requiring as a matter of constitutional law that sentencing authorities be permitted to consider and in their discretion to act upon any and all mitigating circumstances, the Court permits them to refuse to impose the death penalty no matter what the circumstances of the crime." 438 U.S. at 623. The irrationality of such an approach is even more egregious when the determinative factor in the sentencer's decision is not some mitigating aspect of the defendant's crime or character, but whether it should be merciful.[8]

If Selvage's argument is accepted, it no longer will be possible to distinguish "the few cases in which [the death penalty] is imposed from the many cases in which it is not." Furman v. Georgia, 408 U.S. at 313 (White, J., concurring). Appellate review, one of the elements of capital sentencing procedures that the Court has hailed in the past, Gregg v. Georgia, 428 U.S. at 198, would be impossible. To hold the consideration of mercy to be a constitutional requirement, the Court will have moved full-circle since Furman, holding that the very aspect of capital punishment that once made it unconstitutional now is necessary to comply with the Eighth Amendment. Cf.

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[8] In oral argument in Franklin, Justice Scalia, responding to Franklin's argument that "residual doubt" was a mitigating aspect of the defendant's crime that the jury must consider, stated that such a doubt was a circumstance of the trial, and not of the offense. Franklin v. Lynaugh, No. 87-5546, Tr. Oral Arg. at 6. The state submits that the "mercy" Selvage and Franklin urge that a jury must consider is not a mitigating aspect of the defendant's character, but rather the character of the jurors, and should not be constitutionally mandated.

Lockett, 438 U.S. at 631 ("By encouraging defendants in capital cases, and presumably sentencing judges and juries, to take into consideration anything under the sun as a 'mitigating circumstance,' it will not guide sentencing discretion but will totally unleash it.")(Rehnquist, J., concurring in part and dissenting in part).

III.

THE EIGHTH AND FOURTEENTH AMENDMENTS DO NOT ENTITLE A CAPITAL MURDER DEFENDANT TO QUESTION PROSPECTIVE JURORS CONCERNING PAROLE ELIGIBILITY REQUIREMENTS, WHEN ANY CONSIDERATION OF PAROLE IS PRECLUDED BY LAW AND THE JURY IS INSTRUCTED ACCORDINGLY.

The constitutional principles governing the limitation on the state's ability to restrict the scope of voir dire were laid out by the Court in Ristaino v. Ross, 424 U.S. 589, 594-95 (1976).

> The Constitution does not always entitle a defendant to have questions posed during voir dire specifically directed to matters that conceivably might prejudice veniremen against him. Voir dire "is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion." This is so because the "determination of impartiality, in which demeanor plays such an important part, is particularly within the province of the trial judge." Thus, the State's obligation to the defendant to impanel an impartial jury generally can be satisfied by less than an inquiry into a specific prejudice feared by the defendant. (citations omitted).

Ristaino held that voir dire questioning regarding racial prejudice is not constitutionally required absent a finding based on an assessment of "all of the circumstances presented" that there is a "significant likelihood that racial prejudice might infect [the] trial." Id. at 596-97. Ristaino limited Ham v. South Carolina, 409 U.S. 524 (1973), an earlier case reversed for failure to permit voir dire on racial prejudice, to its facts and noted that in Ham the racial issues were "inextricably bound up with the conduct of the trial." Id.

The Court explained its holding further in Rosales-Lopez v. United States, 451 U.S. 182 (1981). There the Court made clear that the Constitution accords "no presumption of juror bias for

or against members of any particular racial or ethnic groups" and establishes "no per se rule in such circumstances requiring inquiry as to such racial prejudice." Id. at 190.

> . . . Only when there are more substantial indications of the likelihood of racial or ethnic prejudice affecting the jurors in a particular case does the trial court's denial of a defendant's request to examine the jurors' ability to deal impartially with this subject amount to an unconstitutional abuse of discretion.
>
> Absent such circumstances, the Constitution leaves it to the trial court and the judicial system within which that court operates, to determine the need for such questions. . . .

Id. Thus, contrary to Selvage's assertion, it is not the limits on voir dire that create an unreasonable risk of bias or prejudice infecting the trial process which violate due process. Rather, it is only when there are substantial indications of an unreasonable risk of bias or prejudice affecting the jurors' deliberations in a particular case that the trial court's denial of a defendant's request to examine the venire member on such a subject is elevated to constitutional dimension.

In urging an Eighth Amendment violation, Selvage interprets Turner v. Murray, 476 U.S. 1 (1986), as holding that the punishment of death and the application of the individualized sentencing doctrine create the unique opportunity for bias to operate undetected, and that unrestricted voir dire is essential to ensure the reliability of the sentencing proceeding. Selvage then assumes that full disclosure about parole is constitutionally indispensable to ensure the reliability of a capital sentencing proceeding by avoiding an unacceptable risk that the death penalty may be imposed based on mistaken notions of parole law.

Selvage takes the language of Turner out of the context of the decision. Rather than authorize a departure from Ristaino, Turner builds on its analytical framework to find the combination of an interracial crime with Virginia's individualized capital sentencing statute created "a unique opportunity for racial prejudice to operate but remain undetected," and held that a

capital defendant accused of such a crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of juror bias. Id. at ___, 106 S.Ct. at 1688 (emphasis added). The holding was firmly rooted in a federal habeas court's special responsibility to enforce the Fourteenth Amendment's prohibition of racial discrimination and constitutionalized the voir dire inquiry "on the facts of th[at] case." Turner, 476 U.S. at ___, 106 S.Ct. at 1687. The Court expressly noted that it was not retreating from Ristaino and affirmed the requirement of "special circumstances" showing a "significant likelihood that racial prejudice might infect [the] trial." Id. at ___, 106 S.Ct. at 1687 n. 7.[9]

The constitutional "significance" Selvage attaches to voir dire on parole eligibility is contrary to California v. Ramos, 463 U.S. 992 (1983). The factual "significance" he attaches is unprecedented, unsupported and illogical. Ramos recognizes that jury instructions on parole or clemency matters in capital cases are solely matters of state discretion.[10] Ramos found no constitutional violation in the state instructing the jury that the Governor may commute a life sentence. At the same time, it found no constitutional requirement that the jury be given an additional instruction that the Governor may also commute a death sentence. So holding, Ramos rejected the constitutional significance that Selvage now attaches to the jury's knowledge of parole: that full disclosure of clemency or parole matters is necessary to a reliable sentencing proceeding in a capital case because it may mitigate in favor of life by clarifying any

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[9] Turner does not require the trial court to sua sponte voir dire on racial factors and does not constitutionally require such voir dire unless the crime was an interracial one.

[10] "Our conclusion [that the state may disclose to capital juries the Governor's power to commute a life sentence consistent with the Constitution] is not intended to override the contrary judgments of state legislatures that capital sentencing juries in their states should not be permitted to consider the Governor's power to commute sentences." Ramos, 461 U.S. at 1013-14.

misconceptions that the state instructions may cause. Moreover, the Ramos court found such information "would not eliminate any skewing in favor of death or increase the reliability of the sentencing choice." Ramos, 463 U.S. at 1011. In fact, the Court noted that the instruction the defense requested could decrease the reliability of the sentencing proceeding.

> [A]dvising jurors that a death verdict is theoretically modifiable, and thus not "final," may incline them to approach their sentencing decision with less appreciation for the gravity of their choice and for the moral responsibility reposed in them as sentencers.

Id. Moreover, instructing a jury on matters extraneous to the sentencing proceeding does not "foster the Eighth Amendment's 'need for reliability in the determination that death is the appropriate punishment in a specific case'" by helping "to limit the jury's consideration to matters in evidence before it." California v. Brown, ___ U.S. ___, 107 S.Ct. 837, 840 (1987).

As a factual matter, it is at best an exercise in sophistry to argue, as does Selvage, that a juror might decline to impose the death penalty if it were disclosed that a life sentence meant that the defendant would be incarcerated for a minimum of twenty years because the general public would be adequately protected by such a life sentence. Rather, informing jurors that the defendant will be eligible for release in twenty years would create in the jurors an expectation of early release and could predispose the jury to the belief that death is the only penalty sufficient to protect society. Moreover, there is no benefit to the defendant. One of the primary reasons why Texas has refused to permit the injection of parole considerations into capital trials is to prevent the jury from "increasing punishment in anticipation" of the possibility of granting parole, Munroe v. State, 637 S.W.2d 475, 477 (Tex. Crim. App. 1982), and this view is shared by a majority of the states. Ramos, 463 U.S. at 1013-14 n.30. Moreover, the possibility of the jury assessing death because of the possibility of parole is greater when the facts of the offense are as egregious as here.

Selvage's conclusion that jurors have "widely held misconceptions about the actual effect of imposing a life sentence" is, at best, rank speculation and, at worst, a rending of the jury's cloak of presumed impartiality. It not only presupposes that prospective jurors harbor such misconceptions, a supposition which has no support in this record, as the state trial court and the Court of Criminal Appeals accurately point out, see Ex parte Selvage, No. 16,884-02, at 163 (Findings of Fact and Conclusions of Law), but that the jurors will dishonor their oaths and disobey the instructions given by the court. Just as a court should not presume juror bias for or against member of any particular racial or ethnic group, Rosales-Lopez, 451 U.S. at 190, this Court should not presume that sentencers will disregard the court's instruction to not allow parole eligibility to enter into their punishment deliberations. Cf., Strickland v. Washington, 466 U.S. 668, 695 (1984) ("The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously and impartially applying the standards that govern the decision.")

Where, as here, the defendant demonstrates no reasonable, much less, substantial likelihood of bias or prejudice infecting the jury's consideration of the evidence and law as applied in the court's charge, the restriction on voir dire does not attain constitutional dimension. Even were the case otherwise, reversal would not be mandated. Each prospective juror was individually told that there were two possible sentences: death or life. The court's charge accurately reflected the sentencing alternatives and instructed the jury to remove any consideration of parole from its deliberations. The only reasonable interpretation of the cumulative instructions is that "life means life." Any error

in the trial court's refusal to permit voir dire on parole eligibility was harmless beyond a reasonable doubt.[11]

CONCLUSION

For the foregoing reasons, the state respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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[11] Selvage further asserts that because a panel in King v. Lynaugh had previously reached a conclusion contrary to the decision of the court of appeals below, it was improper for the court below to have vacated the stay of execution, contending that the court ignored this Court's holding in Barefoot v. Estelle by elevating the state's interest in finality of its judgments "over the fundamental notions of orderly processes and due process." See Petition at 23. Review of the opinion below clearly results in the opposite conclusion. The court below noted that the district court held that the panel opinion in King represented the law in the circuit, which was an incorrect assumption in light of the fact that the opinion had been vacated. See Rule 41.3, Local Rules of the Fifth Circuit. The court of appeals below then analyzed the claim and determined that it had no constitutional basis, and therefore Selvage had no likelihood of success on the issue. It is clear that the court below correctly applied the well established rule of law in Barefoot in making its determination on the issue of a stay of execution.